IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1788

HENRY POLLAK, INC., ET AL.,

Petitioners,

v.

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONSE TO RESPONDENTS' MEMORANDUM IN OPPOSITION

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Solely to correct patent errors in points raised by the Solicitor General in the Memorandum for the Respondents In Opposition to the Writ of Certiorari, petitioners, by their attorneys, file this response.

1. Unlike the plaintiffs in *Yoshida International, Inc.* v. *United States*, 71 Cust. Ct. 1, C.D. 4550, 387 F. Supp. 1155 (1974), *revs'd, United States* v. *Yoshida International, Inc.*, 63 CCPA 15, C.A.D. 1160, 526 F. 2d 560 (1975), and in *Alcan Sales Division* v. *United States*, 63 CCPA 83, C.A.D.

1170, 524 F. 2d 937, *cert. den.*, 389 U.S. 976 (1976), petitioners do not here, nor have they ever in these suits, challenged the authority of the President to impose the supplemental duty assessment characterized by the Government as an import surcharge.

Petitioners have, on the contrary, sought the relief provided by the Congress of the United States in the Trading with the Enemy Act (TWEA) by instituting statutory suit against the Treasurer of the United States and others. The TWEA provides that suits in equity shall be brought in the District Courts, and *only* in the District Courts. The TWEA is the sole source for the power exercised by the President in this matter, and the sole source in law, by its very terms, for any relief. The Solicitor General misstates the entire nature of petitioners' cause of action (Memo., p. 4), in likening petitioners' suits in the District Court to the suits in *Alcan* and *Yoshida, supra.*

2. Respondents further state (Memo., p. 5) that the Courts below concluded that the nature of petitioners' suits has nothing to do with the *source* of statutory authority under which petitioners assert their rights. This conclusion constitutes the fundamental error of those courts and the fundamental violation of the rights of the corporate citizen-petitioners. It is a doctrine as yet unknown to our law. The source of executive action must be the law. The remedy must follow the law, and if that law be statutory, must follow the statute.

By what right did the President act, was the question posed by the *Yoshida* and *Alcan* suits. The response was that he acted by virtue of the TWEA, a specific statute passed by Congress for specific purposes, and providing an exclusive remedy for alleged abuse, its own section 9(a). The question, quite different, posed by these suits brought in equity under section 9(a) is: by what right does the Treasurer of the United States *retain* the property of

citizens, neither enemies or allies of enemies of the United States, under the TWEA? It is not a response to that question to say that the Customs Court should have jurisdiction of the matter because the President made use of the Customs Service in taking the monies of citizens, because the TWEA provides a sole form of relief, *i.e.*, suit in the District Courts, for takings by virtue of the powers grated in it to the Executive. Therefore, to ignore the *source* of the Presidential power exercised in imposing the surcharge, is to ignore the fundament of our legal system and to exalt Executive prerogative in acting through the manifold agencies of the Federal Government above the legal framework enacted by Congress for the correction of abuses of such prerogative, which framework requires scrutiny of the specific Executive actions involved in the *retention* of the property of citizens under the TWEA by the District Courts sitting in equity.

3. The purpose of the instant petition is to have this Court correct the patent error of the Courts below: dismissal of suits provided for specifically by the Congress of the United States in the TWEA by considering not the *source* in law of the powers found to have been exercised, but the form of their exercise. This error caused the Courts below to shirk their duty to interpret a statute of the United States. No more grievous complaint could be brought before this Court by citizens of the United States. The source in law of Presidential and Executive actions may not be allowed to be obscured by form, as has been done here, for our Republic operates only by force of law. A law which cannot be enforced by the Courts constituted specifically by Congress to do so, must deprive citizens of the due process of law guaranteed them by the Constitution, rendering such law itself unconstitutional. *See: Central Union Trust Co.* v. *Garvan*, 254 U.S. (1921), *Becker Steel Co.* v. *Cummings*, 296 U.S. 74 (1935), *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480 (1945),

and *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), as regards the constitutionality of the Trading with the Enemy Act.

Wherefore, petitioners again pray that this Court may grant the writ here requested or summarily reverse the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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